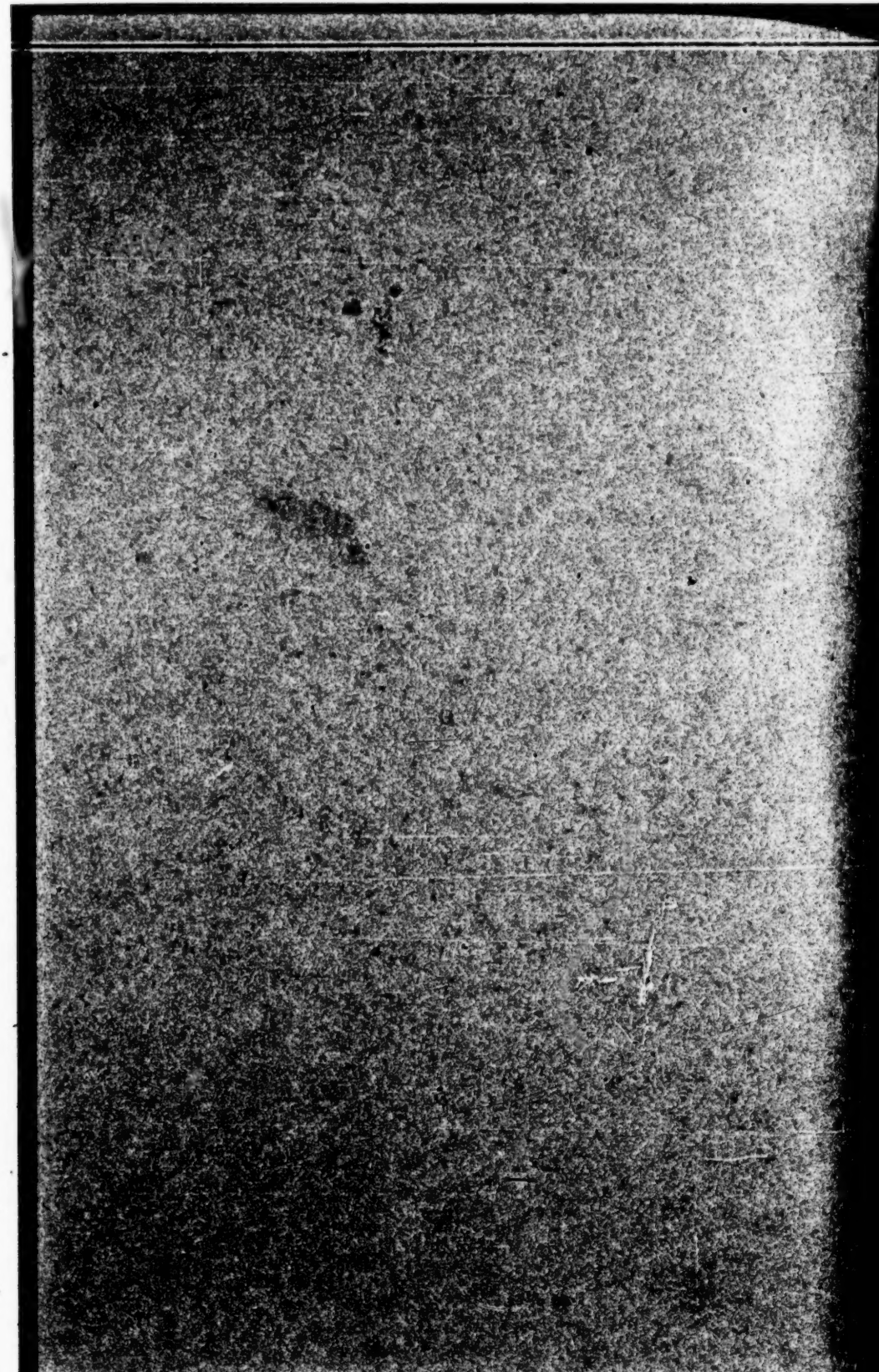

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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 521.

STEAMSHIP "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, CLAIMANT,

Petitioner,

against

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

BRIEF FOR PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT.

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HOMER L. LOOMIS,
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On the Brief.

(6-7975) Printing Office, Inc., 154 Nassau St., New York, N. Y.

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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 521.

Steamship "ANSALDO SAN GIORGIO I",
SOCIETA NAZIONALE DI NAVIGAZIONE,
Claimant,
Petitioner,

AGAINST

THE RHEINSTROM BROTHERS COMPANY,
Respondent.

BRIEF FOR PETITIONER.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

I.

Official Reports of the Opinions Below.

The opinion of the Circuit Court of Appeals (R. pp. 193-197*) is reported in 73 F. (2d) 40 (Adv. Sheets). The report of the Special Commissioner (R. pp. 165-180) is unreported. The opinion of the District Court sustain-

* The reference (R.) found herein refers to the record herein; the reference (O. R.), for old record, refers to the record on appeal from the earlier interlocutory decree, which record constitutes Exhibit 3 in this record (R. p. 6) but by stipulation of counsel was not physically incorporated in the record in the Circuit Court of Appeals (R. f. 6) and in the record here (R. p. 279) and has been separately certified and filed herein as such exhibit in connection with this record (R. pp. 278-279).

ing petitioner's exceptions to the Commissioner's report (R. pp. 180-185) is reported in 3 F. Supp. 579. The memorandum opinion of the District Court dismissing the libel (R. 187) is not officially reported. The opinion of the District Court upon the trial of the merits (O. R. ff. 471-474) is not officially reported.

II.

Jurisdiction.

(1) The decree to be reviewed is that of the Circuit Court of Appeals, Second Circuit, dated and filed September 24, 1934, reversing the decree of the District Court (R. pp. 197-198). The petition for certiorari was filed November 7, 1934, and the order allowing the writ was granted and filed December 3, 1934 (R. p. 201).

(2) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C., Title 28, Section 347, and Article 3, Section 2, of the Constitution of the United States of America.

III.

Statement of the Case.

The petitioner steamship Ansaldo San Giorgio I is a vessel owned by claimant-petitioner Societa Nazionale di Navigazione, a corporation duly organized and existing under the laws of the Kingdom of Italy.

In response to a libel *in rem* filed by respondent (libellant) in the United States District Court for the Southern District of New York against said steamship, Societa Nazionale di Navigazione duly appeared as claimant and filed its answer to the libel.

The cause of action sued on arose in August, 1920 (R. f. 209, p. 149, O. R., f. 10). The libel, which was filed on March 1, 1922, (R. f. 1, p. 1), complained of damage to three lots of cherries in brine shipped in barrels and casks aboard the steamship Ansaldo San Giorgio I as follows: 2,955 barrels at Genoa for Philadelphia on July 17, 1920 (O. R. f. 6); 466 casks at Genoa for Philadelphia on July 17, 1920 (O. R. f. 8); and 845 barrels at Naples for New York on July 25, 1920 (O. R. f. 9). The complaint was that the cherries on arrival at destination were "not in like good condition as shipped", but were "short, seriously injured and damaged" (O. R. ff. 10-11).

The merits of the case were passed upon by District Judge Winslow and an interlocutory decree entered in the District Court in libellant's favor on October 20, 1927, and the matter referred to a Special Commissioner to assess the damage (O. R. ff. 476-477). This interlocutory decree was affirmed without opinion (26 F. (2d) 1016) and certiorari was denied (278 U. S. 633) on October 22, 1928 (R. f. 210, p. 150).

The respondent based its cause of action upon contract, as embodied in and evidenced by bills of lading (O. R. ff. 4, 9-10), which it introduced in evidence as its own exhibits (O. R. p. 141, Libellant's Exs. 1, 3). These bills which were all of the same general form and signed by both shipper and carrier contained a clause numbered "Eleventh" as follows:

> "ELEVENTH: In the event of claims for loss, damage or short delivery the same shall be adjusted on the basis of the invoice value of the entire shipment adding expenses necessarily incurred" (O. R. p. 141, R. f. 274, p. 174).

The hearings before the Commissioner for the assessment of damages commenced on December 23, 1930 (R. f. 8, p. 5). At the first hearing various proofs were offered, including the old record on appeal and libellant's exhibits therein (R. f. 9, p. 6), which included photostats

of the three commercial invoices for the three lots of cherries (O. R. pp. 153, 154, 155, Lib. Ex. 7). At the end of that hearing both parties rested, briefs and reply briefs to be filed and exchanged, which was accordingly done (R. f. 11, p. 7). Following a lapse of approximately one year without a decision by the Commissioner, libellant moved to re-open the reference and put in further testimony, which motion was granted and the second hearing held on December 7, 1931 (R. f. 12, p. 8), at which time libellant put in evidence translations of the three commercial invoices which were in Italian (R. f. 14, p. 9). A further hearing was held on January 26, 1932, at which time libellant produced and examined two witnesses to prove market value, and thereupon rested for the second time (R. pp. 10-30).

At the re-opened hearing of December 7, 1931, libellant's counsel revealed for the first time what had happened to the three lots of damaged cherries, stating at that time that libellant itself had used them (R. p. 10). Accordingly, when libellant's counsel rested for the second time without bringing forward evidence through libellant's officers, of the monetary value realized by the latter from its use of the cherries, claimant's (petitioner's) counsel proceeded to Cincinnati and took the depositions of those officers, libellant's counsel attending and cross-examining the witnesses (R. ff. 212-229, pp. 151-165). That closed claimant's testimony.

The Commissioner rendered and filed his report on October 17, 1932 (R. pp. 3, 151). As appears by the report the Commissioner ruled in substance that clause "Eleventh" of the bills of lading, as set forth above, was a clause limiting liability and was invalid because there was no proof that the shippers had been offered a choice of rates (R. p. 172); that in consequence the measure of recovery was market value. The Commissioner then found that of the three lots of cherries shipped, the contents of 1030 barrels (or perhaps more accurately 1051 barrels, the

figure including 45 barrels short delivered) were damaged in varying percentages (R. pp. 173-174, 175, 176, 178). These damage percentages were not arrived at, however, by an actual separation of damaged from undamaged cherries. They were mere estimates by a cargo surveyor made from an examination of a couple of handfuls of a barrel's contents (R. p. 115) and agreeing with the consignee's representative as to amount (R. p. 104). The damage so found to have been suffered was a damage in value, the barrels containing sound, shrivelled and broken cherries, all of which were used by libellant but for different purposes (R. p. 155). The Commissioner, however, presumably for convenience in computing loss according to the measure he had ruled was applicable, converted these various damage percentages into barrels of destroyed cherries, reduced them to pounds and assessed damages as the total of the pounds so found times the market value per pound of sound cherries (R. pp. 173-176), plus interest (R. p. 178), the aggregate of which he found to be $26,006.99 (R. p. 178).

Exceptions were filed to the Commissioner's report (R. pp. 178-180), which were brought on for hearing in the trial court, and following extensive argument, oral and written, the court, after due consideration, sustained the exceptions in so far as they related to the Commissioner's ruling that clause Eleventh of the bill of lading was invalid and in so far as they related to the consequent erroneous method of assessing damage (R. pp. 180-185).

The basis of the District Judge's decision was that, since the invoice value of the whole shipment was the basis for computation of loss and damage in any event, irrespective of benefit or detriment that might result, whether to carrier or to shipper, and was not merely designed as a limitation to redound only to the carrier's benefit when the loss and damage would otherwise be larger, it constituted a convenient and reasonable rule for the assessment of damages; that it was fair and proper as

introducing an element of certainty into the calculations of the parties and as avoiding the risks of more or less unpredictable fluctuation of the market; that it was fair and equitable since it was equally binding upon both and might prove quite as beneficial to one as to the other; that therefore it needed no special consideration such as choice of rates to support it (R. pp. 182-184). In applying clause Eleventh the District Judge treated it as providing a new measure of the damages, which thereunder were to be computed by determining the amount by which the invoice value of the whole shipment exceeded the arrived or damaged value of the shipment (R. pp. 184-185).

A further hearing was then held before the District Judge pursuant to direction to determine whether and to what extent the entire invoice value plus expenses exceeded the arrived value of the shipment. The result of that hearing was that there was found to be no such excess, that the libellant consequently had not suffered damage and that the libel was ordered dismissed (R. pp. 186, 187).

From the order so dismissing the libel, libellant appealed to the Circuit Court of Appeals, assigning as error in substance the holding of the court that clause Eleventh was reasonable and valid; failure to hold that it was invalid because there was no proof of an offer of alternative rates; and the holding that under clause Eleventh the libellant's damages were the difference between the invoice value of the entire shipment and the arrived market value of the entire shipment, both damaged and undamaged (R. pp. 189-191).

Decision of Circuit Court of Appeals.

The Circuit Court of Appeals reversed the decree of the District Court and ordered that libellant recover damages as found by the Commissioner (R. p. 277). In its opinion the court held in substance that a mutual agreement to

accept the invoice cost of the damaged goods as the measure of their value in sound condition at destination "may be of advantage to either party" and is a salutary provision; that clause Eleventh in the bill of lading, however, "does not substitute invoice value for market value of the goods lost or injured", but "the invoice value of the entire shipment"; that to use the latter standard as the measure of damages here would, by reason of market conditions existing on the date of delivery, allow the carrier to "escape liability" for the loss and damage caused by its negligence; and that "a contract which would thus exempt a carrier from liability resulting from its negligence is so unreasonable that it must be held contrary to public policy and void" (R. p. 196).

The Circuit Court of Appeals in its opinion gave no consideration to the benefit to the shipper and the detriment to the carrier that would have resulted had the arrived value of the cherries by reason of market conditions been different; it gave no consideration to the protection against a possibility of an out of pocket loss that the clause gave and the shipper enjoyed during the transit of the goods, a protection not afforded by the common law. In other words, that court gave no consideration whatsoever to the protection against possible loss enjoyed by the shipper by reason of this clause. It gave no consideration to the advantages to the shipper and the detriment to the carrier that might result from its application, which, as held by the District Judge, was a test of its reasonableness and fairness. The court did not analyze the clause abstractly as had the District Court to determine whether its provisions were reasonable as mutually protective. Instead the court measured the reasonableness of the clause only by the result of its application under the peculiar circumstances and market conditions obtaining at the time of the delivery of the shipment in this particular case.

IV.

Specifications of Error.

The Circuit Court of Appeals erred in the following respects:

1. In holding that clause "Eleventh" of the bills of lading is unreasonable and contrary to public policy.

2. In holding that clause "Eleventh" of the bills of lading is void.

3. In holding that clause "Eleventh" of the bills of lading exempted the carrier from its negligence.

4. In reversing the decree of the District Court dismissing the libel and ordering that respondent recover damages as found by the Commissioner.

V.

Argument.

Summary of Argument.

A common carrier "may modify his common law responsibility by special contract" where such contract is not unreasonable and is assented to by the shipper (*Cau* v. *Texas Pacific Ry. Co.*, 194 U. S. 427, 430-431). A stipulation in a bill of lading that claims for loss or damage shall be adjusted or computed on the basis of the invoice value of the property, the subject of shipment, plus prepaid freight, is a special contract substituting a new measure of damages for the measure that would ordinarily prevail (*Gulf, Colorado Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31, 37; *Pennsylvania R. R. Co.* v. *Olivit Bros.*, 243

U. S. 574, 586). Such modification of liability is controlling (*Phoenix Ins. Co.* v. *Erie Transportation Co.* (117 U. S. 312, 332) and enforceable (*Gulf, Colorado Ry. Co.* v. *Texas Packing Co., supra; The Oneida,* 128 Fed. Rep. (C. C. A. 2d) 687, 692), even although the carrier has not presented the shipper with the actual alternative of selecting under which liability he will ship his goods (*Cau* v. *Texas Pacific Ry. Co., supra*). Clause "Eleventh" in the bills of lading herein, which provides that claims for loss or damage shall be adjusted on the basis of the invoice value of the entire shipment, is a modification of the carrier's common law liability in that it substitutes a contractual measure of damages for the measure that would ordinarily prevail. It is of the same type as those under consideration and enforced in *Gulf, Colorado Ry. Co.* v. *Texas Packing Co.* and *The Oneida* (*supra*) and has been held valid and enforceable by the great weight of authority in the state courts without the tender of an alternative freight rate (*The Ansaldo San Giorgio I,* 3 Fed. Supp. 579, 581, and cases cited). It meets the tests as to validity stated in *Cau* v. *Texas Pacific Ry. Co.* (*supra*). The bill of lading containing it is signed by both shipper and carrier (O. R. p. 141). It is not operative exclusively in the interest of the carrier; and is equally binding on both (*The Oneida, supra*). It guards the parties against unpredictable fluctuations in the market while the goods are in transit, furnishes a ready and convenient standard to measure loss and may frequently work out to the benefit of the shipper and the detriment of the carrier (*Chicago etc. Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97, 99; *The Oneida, supra, The Ansaldo San Giorgio I, supra*). The clause "has no tendency to exempt from liability for negligence". For like the limitation or agreed value clause "it does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on" (*Adams Express Co.* v. *Croninger,* 226 U. S. 491, 510). Enforcement of it does not violate public policy. On the other

hand failure to enforce it conflicts with public policy, is repugnant to the soundest principles of fair dealing and freedom of contract, and rewards the shipper for a form of deceit by allowing him to repudiate the contract after the event shows it to have been to his advantage to do so (*Hart* v. *Pennsylvania,* 112 U. S. 331, 341).

Division of Points of Argument.

At the outset of the consideration of the question here presented it is to be observed that there have been three separate judicial appraisals of the agreement here under consideration, all of which differ among themselves either in the results arrived at or in the premises on which such results are predicated.

The special commissioner ruled that the agreement is one limiting the carrier's liability and that it is invalid because "there was no proof that the shipper was offered an alternative freight rate under which the carrier's liability would be unlimited" (R. p. 195). The District Court held that the agreement "is not a limitation clause at all but is a provision fixing a new measure of damages * * * and may work out to the benefit of the shipper and the detriment of the carrier * * * and is reasonable and valid without the offer of an alternative rate". (R. p. 183). The Circuit Court of Appeals held that the clause "does not substitute invoice value for market value of the goods lost or injured * * * that the invoice value of the entire shipment, not the invoice value of the lost or damaged goods, is to constitute the basis for computing whether damages have been sustained"; that to give the clause such effect in the present case the carrier would pay nothing for a loss and damage caused by its negligence; and that "a contract which would thus exempt a carrier from liability for losses resulting from its negligence is so unreasonable that it must be held contrary to public policy and void" (R. p. 196).

In view of these different constructions, different considerations and different conclusions as to the reasonableness and validity of the clause, we believe it will be appropriate to consider the reasonableness of the clause in the light of existing precedent exclusive of and prior to a consideration of the soundness of the reasons advanced by the Circuit Court of Appeals for holding the clause to be unreasonable and contrary to public policy. We will therefore consider in the order indicated (1) the validity of the agreement as a modification of the carrier's common law responsibility and the invalidity of objections urged against it by respondent; (2) the insufficiency of the reasons set forth by the Circuit Court of Appeals on which it predicated its holding that the agreement is unreasonable, contrary to public policy and void.

POINT I.

The agreement mutually binding on shipper and carrier to adjust claims for loss and damage on the basis of the invoice value of the entire shipment plus expenses merely substitutes a fair conventional measure of damages definite and certain as to amount for the measure indefinite and uncertain in this respect that would otherwise govern and is a reasonable modification of the carrier's common law responsibility.

The respondent's attack upon the clause both in the District Court and in the Circuit Court of Appeals was upon the grounds advanced by the commissioner for holding it invalid, viz.: That it was a provision limiting the carrier's liability and that there was no proof that the shipper was offered an alternative freight rate under which the carrier's liability would be unlimited (R. pp. 189-190). The cases cited by respondent in the court below in support of the contention of invalidity based on the

absence of an offer of alternative freight rates were all cases involving a limitation of liability clause.

That the clause here under consideration is not such a clause is fairly evident, we believe, from a mere reading of the same. It does not purport to limit liability. It is not phrased in words "which are words of limitation", words which distinguish such clauses from others, such, for instance, as agreed valuation clauses (*The Caledonier*, 42 F. (2d) 856, 857). Furthermore, as pointed out in *The Merauke*, 31 F. (2d) 974, 975, a limitation of liability clause "attempts to say that the shipper shall not recover the full measure of the loss he has sustained", and is not at all what we have here, viz.: A mutual covenant "agreeing to accept the invoice cost (plus expenses) as the measure of the value of the goods at port of destination". (See *The Merauke, supra*).

It would seem too clear for argument that the clause here involved does not "attempt to say that the shipper *shall not* recover the full measure of the loss he has sustained". On the contrary, under this clause the shipper not only is *not excluded* from recovering the full measure of his loss, even as measured by the yardstick of the common law, but also he may recover under it an amount greater than his loss as measured by that law. As was said by this Court in *Chicago etc. R. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99, of a bill of lading clause which, as respondent conceded in its brief below, "was of the same type as that presented here":

> "We appreciate the convenience of the stipulation in the bill of lading and the arguments urged in its favor. We understand that it *does not necessarily prevent a recovery of the full actual loss,* and that if the price of wheat had gone down the carrier might have had to pay more under this contract than by the common law rule." (Italics supplied).

The construction of the clause as thus given is, it would seem, entirely inconsistent with the definition of a limita-

tion of liability clause as laid down in *The Merauke,* (*supra*). We submit that the intent manifest from its wording, both as a matter of reasonable construction and as a matter of precedent, negatives it as an attempt merely to limit the carrier's common law liability, but establishes it as an agreement fixing a new measure of damages equally binding on carrier and shipper.

It was the sustained contention of respondent below, however, in substance at least, that, under the decisions of this Court there cited and relied upon as authorities on measure of damages, a shipper must always be actually presented with the opportunity to select under which, the common law measure or one varying that measure, he will ship his goods. We do not so understand the rule, even where the provision involved is a true limitation of liability clause. In *Cau* v. *Texas & Pacific Ry. Co.,* 194 U. S. 427, 430-431, this Court said:

> "But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an 'option and opportunity must be given to the shipper to select under which, the common law or limited liability he will ship his goods.'
>
> If this means that a carrier must take no advantage of the shipper or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the 'option and opportunity' which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, *New Jersey Steam Navigation Co.* v. *Merchants' Bank,* 6 How. 344, and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *Railroad Co.* v. *Lockwood,* 17 Wall. 357; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174.

> Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed."

It seems to us the test of validity here stated is not whether an alternative is actually presented to the shipper to ship under a liability measured by the common law rule but rather whether the measure of liability under which the goods are shipped is one assented to by the shipper, and whether it is reasonable. The clause here involved, we submit, meets both these tests. That the shipper knew of, and assented to, this clause is apparent from an examination of the bills of lading containing the clause, *which are signed by the shipper as well as by the carrier* (O. R. pp. 139, 141), and there is no evidence whatsoever of a protest against or an objection to it, either at the time of shipment or subsequently. That the clause is reasonable would seem to appear upon its face, securing, as it does, the shipper against an out of pocket loss by reason of fluctuations in market during transit and furnishing a ready and convenient standard for measuring loss in case of damage.

Respondent cited and relied upon in the lower court the following cases in this court as supporting its contention that the clause here under consideration is invalid, viz.: *Hart* v. *Pa. R. R. Co.* (112 U. S. 331); *Union Pacific R. R. Co.* v. *Burke* (255 U. S. 317); *Adams Express Co.* v. *Croninger* (226 U. S. 491); *Boston & Maine R. R. Co.* v. *Piper* (246 U. S. 439); *American Railway Express* v. *Lindenburg* (260 U. S. 584); *Kansas Southern Ry. Co.* v. *Carl* (227 U. S. 639). While it is true that in most of those cases clauses limiting liability to a stated value were held to be valid where the shipper had the option to ship under a rate preserving the unlimited common law liability of the carrier, we do not believe that the process of reasoning by which this Court arrived at its determination sus-

taining such a limitation under such circumstances justifies a conclusion that such an alternative was laid down as a condition for sustaining it. We believe that it fairly appears from the reasoning of those cases, at least when rationalized with the rule stated in others, that the basis for sustaining the limitation was that it was under the circumstances a reasonable provision, and that the option offered the shipper to ship under full liability was clear evidence of its reasonableness.

We are strengthened in this view by the decisions of this Court that have sustained other limitations of common law liability in the absence of an option offered of shipping without such limitation. Such limitations so sustained include among others the following, viz.: One providing exemption from liability for damage from various excepted causes (*Clark* v. *Barnwell,* 53 U. S. 272); a limitation exempting for loss occasioned by fire (*York Company* v. *Central Railroad,* 3 Wall. 107; *Bank of Kentucky* v. *Adams Express,* 93 U. S. 174); one limiting liability upon through shipments to losses occurring on carrier's own line (*Railroad* v. *Pratt,* 22 Wall. 123); a provision that in case of loss the carrier shall have the benefit of any insurance effected upon the goods (*Phoenix Ins. Co.* v. *Erie & Western Transp. Co.,* 117 U. S. 312); a provision exempting the carrier from action for loss and damage unless the shipper file notice of claim for loss or damage within a defined time (*Express Co.* v. *Caldwell,* 21 Wall. 264; *Queen of the Pacific,* 180 U. S. 49). These and kindred limitations and variations of common law responsibility are sustained because they are reasonable, not because of any option offered to the shipper to ship without such a limitation of the carrier's common law liability.

We believe therefore that the governing rule to be evolved from the cases in this Court is, that, in determining the validity of any provision which limits the carrier's all responsibility at common law, the test to be applied is the reasonableness of the limitation; and that this rule

applies to a limitation of the common law liability in case of loss or damage just as it applies to other limitations of the carrier's common law responsibility.

However, even if it may be said that under the decisions of this Court an opportunity to ship under alternative rates is a condition for sustaining a provision limiting liability in case of loss, the clause under consideration here, as pointed out above, is not such a provision. And the respondent did not below, and we submit cannot here, cite any decision in this Court holding such a clause unreasonable, although in *Chicago etc. Ry. Co.* v. *McCaull-Dinsmore Co.* (*supra*) the Court, despite its favorable consideration, felt compelled to hold it unenforceable as to interstate shipments by reason of the command of an amendment to the Cummins Act. On the other hand, where the clause has received this Court's consideration, as we shall later point out, and where its judgment has not been bounded by legislative enactment, it has received the Court's approval.

It is true, of course, that an agreement that exempts a carrier from its negligence is unreasonable and, as said by respondent in its brief below, such an agreement is no more valid because it rests upon consideration than if without consideration (*Kansas Southern Ry.* v. *Carl*, 227 U. S. 639, 650). And, where, as in *Boston & Maine R. R.* v. *Piper* (*supra*), the agreement is not a limitation upon the amount of recovery or one "limiting liability to an agreed valuation" but one which expressly "attempts to limit the carrier's liability for negligence", it is invalid although the shipper was given a reduced freight rate. But the mere fact that the effect of a provision may be to alter the ultimate financial responsibility of the carrier or recovery of the shipper does not give it the character of exempting the carrier from its negligence. Even a clause limiting the carrier's liability to an arbitrary amount bearing no relation to actual value is valid (*Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 285), because it is rea-

sonable for the carrier to measure its responsibility in relation to rate charged (*Adams Express Co.* v. *Croninger*, 226 U. S. 491, 510) and such limitation "has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on" (*Adams Express Co.* v. *Croninger* (*supra*)).

In the absence, therefore, of a provision that in terms expressly or impliedly exempts the carrier from the results of its negligence, the determination of whether a given clause does or does not contravene public policy must rest, in the last analysis, as it seems to us, upon its fairness and reasonableness under the circumstances (as, for example, whether it may prove of benefit to the shipper and of detriment to the carrier, as well as the reverse) and not upon the fact that it may alter the ultimate financial responsibility of the carrier or recovery of the shipper where the carrier has been negligent. We are brought again, therefore, to a consideration of the reasonableness of the clause here under consideration, which admittedly alters the common law responsibility of the carrier by substituting a new measure of damages where loss and damage occur.

As introductory and persuasive reasoning in support of the reasonableness of the clause, we cannot better the cogent and, as we believe, sound analysis of it set forth in the opinion of the District Court, where that Court said: (*The Ansaldo San Giorgio I* (3 F. Supp. 579, 581, R. pp. 182-183)):

> "There is a substantial difference between an agreement that damages shall be adjusted on the basis of invoice value and an agreement that in case of damage no value higher than the invoice value shall be allowed. The latter is a strict limitation agreement, operative only in favor of the carrier who may always disregard its presence and show that the market value at destination was less than the invoice value and take advantage of that fact. The former is not a limitation

clause at all, but is a provision fixing a new measure of damages. In instances where the market price of the commodity drops between the time of shipment and the time of arrival at destination, the clause may work out to the benefit of the shipper and the detriment of the carrier. The difference was noted in the *Merauke* Case (*The Merauke,* 31 F. (2d) 974) and in the *Kilthau* Case, (*Kilthau* v. *International Mercantile Marine Co.,* 245 N. Y. 361,) and the intimation in both opinions is that a provision for computing damages by reference to invoice value is reasonable and valid without the offer of an alternative rate bearing unlimited liability.

The fact is that such a clause is not unreasonable or offensive to public policy, and on principle should be treated as valid. It does not place an artificial or arbitrary value on the goods. It guards the parties against fluctuations in the market while the goods are in transit. It furnishes a ready and convenient standard for measuring the loss in case of damage, and tends to promote prompt settlements by leaving no room for extravagant claims of market value at destination. As already observed, it is not exclusively in the interest of the carrier, but may frequently confer benefit on the shipper."

It was the expressed opinion of respondent below, shared apparently by the Circuit Court of Appeals, that although the clause had been held valid by the state courts without an offer of alternative rates, its validity under such circumstances did not seem to have been squarely decided by the federal courts. We submit that on principle and in substance the federal courts have squarely decided the question and upheld the validity of the clause. In *Phoenix Ins. Co.* v. *Erie Transp. Co.* (117 U. S. 312, 322), this Court, defining the limits of the rights under subrogation of a cargo insurer in an action brought by the latter against the carrier, said:

"any lawful stipulation between the owner and the carrier of the goods, limiting the risks for which the carrier shall be answerable, or the time of making

> the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier; * * * So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & Montgomery Railway* v. *Jurey,* 111 U. S. 584."

In *The Oneida,* 128 Fed. (C. C. A. 2nd) 687, the bill of lading contained the following clause (p. 689):

> " 'In ascertaining the amount of such damage, the same shall be computed at the value or cost of the said goods or property at the time and place of shipment.' "

In that case, involving damage to the goods carried, Judge Wallace, considered the effect of the clause and, after pointing out that its language is more consistent with the meaning "that as a basis for computing the damages their cost or value at the place of shipment is to be substituted for their market value at the place of destination", continued at page 692:

> "The clause was probably inserted for the benefit of both parties, and to relieve either from the chances of an excessive loss arising by abnormal fluctuations in the market value of the goods occurring after the time of shipment, and whereby the market value at the time of delivery might be much higher or much lower than at the time of shipment, or than ordinarily. * * * Under a bill of lading like the present the shipper's loss is fairly measured by the difference between the cost or value of the goods at the time and place of shipment and their value in their damaged condition at the place of delivery, together with the expenses incurred for their transportation."

In *Duplan Silk Co.* v. *Lehigh Valley R. Co.,* 223 Fed. Rep. 600, Judge Hough, in delivering the opinion of the

District Court, quoted in the affirming opinion of the Circuit Court of Appeals, said, referring to the decision in *The Oneida,* (*supra*), relative to the construction of the clause:

> "It was held to be a conventional substitution of the former value for the latter; the shippers were estopped from using or claiming the higher value, which was the real value."

In *Gulf, Colorado Ry.* v. *Texas Packing Co.,* 244 U. S. 31, this Court had before it a clause similar to the one here under consideration. The clause as set forth at page 36 read as follows:

> " 'The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.' "

This Court, speaking by Mr. Justice Day in holding that the clause changed the rule of damages otherwise applicable, said at page 37:

> "Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. *New York, Lake Erie & Western R. R. Co.* v. *Estill,* 147 U. S. 591, 616. The stipulations of these bills of lading changed this rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damages."

In holding the clause enforceable, and construing the manner of its application, Mr. Justice Day further said at page 36:

> "The testimony showed that the invoice price of the poultry at Temple to the Packing Company was $22,238.56, and that the poultry was worth at least that sum at Temple at the time of shipment. We think that in taking this sum as the basis of computing damages the trial court did but enforce the stipulation in the bills of lading. That sum was the *bona fide* invoice price to the consignee, which the bills provided was to be the basis of recovery in case of loss or damage. We think the court properly charged the jury to take the difference between this invoice price and the value of the poultry at the time the same was delivered in Chicago in arriving at the amount of damages. No question is raised in this case as to the right of the plaintiff to recover also the freight paid. See *Pennsylvania R. R. Co.* v. *Olivit Bros.*, 243 U. S. 574."

The same type of clause had been before this Court in *Pennsylvania R. R. Co.* v. *Olivit Bros.*, 243 U. S. 574, 586, and the provision therein relative to the inclusion of freight charges affirmatively enforced against the carrier.

In neither of these cases, nor in *The Oneida, supra,* was there any suggestion that the enforceability of the clause was dependent upon the carrier's having offered the shipper alternative freight rates. And the reasoning both in the *Gulf, Colorado* case in this Court and in *The Oneida* in the Circuit Court of Appeals, particularly in the latter, negatives the presence of any such choice of rates as the reason for enforcement, and places it upon the entirely different grounds set forth as quoted above.

In the state courts the great weight of authority supports the clause as reasonable without an offer of alternative freight rates. As was pointed out by the District Court (*The Ansaldo San Giorgio I, supra,* at page 581, R. ff. 764-765):

> "There is abundant authority for the proposition that the clause as it stands is valid. For years the

cases have been to the effect that a clause in a bill of lading that loss shall be computed on the basis of the invoice price of the goods is valid, although no alternative rate was tendered the shipper or other special consideration given. *Coleman* v. *New York, New Haven & Hartford R. Co.*, 215 Mass. 45, 102 N. E. 92, 7 A. L. R. 1366; *Fahey* v. *Baltimore & Ohio R. Co.*, 139 Md. 161, 114 A. 905; *Davis* v. *Zimmern*, 211 Ala. 63, 99 So. 307; *Grubbs* v. *Atlantic Coast Line R. Co.*, 101 S. C. 210, 85 S. E. 405; *Brockman Commission Co.* v. *Missouri Pacific R. Co.*, 195 Mo. App. 607, 188 S. W. 920; *Denver, etc., R. Co.* v. *Peterson Grocery*, 59 Colo. 125, 147 P. 663; *Wallingford Bros.* v. *Atchison, etc. R. Co.*, 101 Kan. 544, 167 P. 1136, L. R. A. 1918B, 716; *Bowman-Kranz Lumber Co.* v. *Bush*, 104 Neb. 165, 176 N. W. 91; *J. C. Shaffer Co.* v. *Chicago, etc., R. Co.*, 21 I. C. C. 8."

In its brief in the Circuit Court of Appeals respondent conceded that all but four of the above cases cited by the District Court upheld the clause as valid without a "choice of rates * * * and appear to support the reasoning of the District Court".

That these cases and others that may be cited do support the reasoning of the District Court can hardly be doubted. A review of the state court cases, or even a major portion of them, however, is not within the compass of this brief, and we will confine ourselves to a reference to only two or three from widely separated jurisdictions.

In *Grubbs* v. *Atlantic Coast Line R. Co.*, 85 S. E. 405, 101 S. C. 210, the bill of lading contained a clause similar to that before this Court in the *Gulf, Colorado* case (*supra*). The Supreme Court of South Carolina, in reversing the decision of the Circuit Court holding the clause unenforceable because not supported by the consideration of a reduced freight rate, said at page 405:

"The bill of lading does not show that there was an agreement that, in consideration of a reduced rate of shipment, the amount of recovery in case of loss would be limited to a specified amount. On the contrary,

the language of the bill of lading negatives any such agreement. The provision in the bill of lading was merely intended to establish a rule for determining the value of the property in case of loss, irrespective of the fact whether it was greater at the point of shipment or destination, which could not be foreseen, on account of the fluctuation in prices. It was for this reason that such a rule was upheld in *Matheson* v. *Railway*, 79 S. C. 155, 60 S. E. 437, which is conclusive of this case. It will thus be seen that the principle announced in the case of *Johnstone* v. *Railroad Co.*, 39 S. C. 55, 17 S. E. 512, is not applicable."

In *Denver & R. G. R. Co.* v. *Peterson Grocery Co.*, 147 Pac. 663, 59 Colo. 125, the bill of lading also contained a clause similar to the one in the *Gulf, Colorado* case (*supra*). In reversing a judgment for the plaintiff because of error in instruction as to damages, the Court said at pages 664-665:

"Plaintiff's proof on this question (damages) was limited to the market value at the time and point of destination. The defendant offered no testimony on the subject. By instruction 7 the jury were told, in substance, that if they found for the plaintiff, its damages should be computed on the basis of the value of the property at the point of destination. Exceptions were taken to this instruction. It does not appear that this clause in the bill of lading was supported by a reduced freight rate or other special consideration, and, in the absence of such evidence, we must assume that it was not. * * *

In *Pierce* v. *So. Pac. Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350, the contract made the invoice price at the point of shipment the measure of damages. It was sustained, but there was added as an element of damage the freight actually paid and interest on the whole amount.

In volume 4, Elliott on Railroads (2d Ed.) § 1510a, volume 5, Am. & Eng. Ency. of Law (2d Ed.) p. 335, volume 6, Cyc. p. 401, and volume 1, Hutchinson on Carriers (3d Ed.) § 430, the conclusion stated on this subject, in substance, is that the great weight of authority supports the validity of such stipulations

where they have been freely and fairly entered into, whether the loss be the result of the carrier's negligence or not, and that it does not require a reduced freight rate to sustain it. This conclusion appears to be supported by many of the later decisions. *Spada* v. *Penn. R. Co.* (N. J.) 92 Atl. 379; *Inman & Co.* v. *Seaboard Air Line Ry. Co.* (C. C.) 159 Fed. 960; *Central of Ga. Ry. Co.* v. *Murphey & Hunt*, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720; *Tibbits* v. *R. I. & P. Ry. Co.*, 49 Ill. App. 567; *Davis* v. *N. Y., Ont. & West. Ry. Co.*, 70 Minn. 37, 72 N. W. 823; *101 Live Stock Co.* v. *K. C. & M. B. Ry. Co.*, 100 Mo. App. 674, 75 S. W. 782; *C., R. I. & P. Ry. Co.* v. *Harmon*, 17 Ill. App. 640; *Boscowitz* v. *Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Matheson* v. *So. Ry. Co.*, 79 S. C. 155, 60 S. E. 437; *Gratiot St. Warehouse Co.* v. *M., K. & T. Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11.

This clause was included in a uniform bill of lading recommended by the Interstate Commerce Commission in 1908. 14 Interst. Com. Com'n R. 346. It has since been held valid by that tribunal in an interstate shipment in a case where the loss was occasioned through the negligence of the carrier. *Shaffer & Co.* v. *C., R. I. & P. Ry. Co.*, 21 Interst. Com. Com'n R. 8.

In the case last cited there was a total loss to the consignee, for which reason the payment of freight at the point of destination did not enter into the computation. While this court has never passed directly upon this question, a detailed discussion of it could add but little to what has been said *pro* and *con* in the cases cited, for which reason we will not undertake it, but dispose of it by saying that, as it appears to be recognized as valid in interstate shipments, and also has been held reasonable and valid when fairly and freely entered into by a majority of the state courts which have heretofore passed upon it in intrastate shipments, we are of opinion that we should adopt the conclusion of the majority, and hold it valid so far as it is applicable, until the Supreme Court of the United States declares otherwise, or until further legislation is enacted on the subject."

In *Davis* v. *New York, O. & W. Ry. Co.*, 72 N. W. 823, 824, 70 Minn. 37, cited with approval by this Court in

Penn. R. R. Co. v. *Olivit Bros.* (*supra*), in holding enforceable a clause substituting the value of the goods at point of shipment without providing for the addition of transportation costs as the measure for computing damages, the Court said:

> "The bill of lading introduced in evidence * * * contained a stipulation that the amount of any loss or damages for which any carrier became liable should be computed at the value of the property at the place and time of shipment, unless a lower value had been agreed upon. * * * Upon reflection and consideration we are of the opinion that, in a condition of this nature, there is nothing which excludes from a computation of damages, such sums as may be paid or incurred by a consignee as transportation charges. The condition is simply that the amount of any loss or damage shall be estimated and fixed at the value of the property at the time and place of shipment, and, in the absence of such special contract, the measure of damages is settled by the value at the place of destination, charges for transportation entering into the computation. * * * *If transportation charges paid or incurred by or on behalf of the consignee, or earned by the carriers, but not paid, are to be taken into consideration, we cannot say that the condition is on its face unjust, unreasonable or opposed to public policy.*" (Italics supplied.)

In the case at bar, it is to be remembered, it was *expressly* provided that all such transportation and other charges necessarily incurred should be included in the value of the merchandise.

The respondent contended below that in four of the cases cited by the District Court there was no discussion of, and that it does not appear, "whether or not there was a choice of freight rates". We think, however, that it does appear from the opinions in those cases that the clause was upheld because reasonable, without any reference to or dependency upon a choice of rates. For instance, in *Davis* v. *Zimmern*, 211 Ala. 63, 99 Southern

307, one of the cases referred to by respondent, the reasoning of the court, in sustaining the clause, is quite inconsistent with the necessity of a choice of rates as a condition of its validity. In that case a clause similar to the one under consideration in the *Gulf, Colorado* case (*supra*) was involved. The Court, quoting from one of its own previous decisions, viz., *South. Ry. Co.* v. *Cofer*, 149 Ala. 565, said:

> "* * * It will be observed that no exemption from liability on account of negligence is involved in this stipulation, but the sole effect of it is to fix the place at which the price of the cotton shall be ascertained in respect to the measurement of damages. It has been held that such stipulations in bills of lading are reasonable and enforceable. * * *"

The decision there was that the stipulation, being reasonable and enforceable on its face, was applicable to loss from the carrier's negligence, and required no special consideration to support it. * * *

Dealing with this identical stipulation, the following cases hold it as valid and enforceable against negligent loss or injury, *and without any special consideration—as a reduced freight rate—to support it:* (*Denver, etc. R. Co.* v. *Peterson Co.*, 59 Colo. 125, 147 Pac. 663; *Gratiot St. W'house Co.* v. *M., K. & T. Ry. Co.*, 124 Mo. App. 545, 102 S. W. 11; *Wallingford* v. *A. T. & S. F. Ry. Co.*, 101 Kan. 544, 167 Pac. 1136, L. R. A. 1918B, 716; *Bowman-Kranz Lbr. Co.* v. *Bush*, 104 Neb. 165, 176 N. W. 91; *F. W. Brockman, etc., Co.* v. *Mo. Pac. Ry. Co.*, 195 Mo. App. 607, 188 S. W. 920; *Coleman* v. *N. Y., etc., R. Co.*, 215 Mass. 45, 102 N. W. 92, 7 A. L. R. 1366; *Grubbs* v. *A. C. L. R. R. Co.*, 101 S. C. 210, 85 S. E. 405; *Inman* v. *S. A. L. R. Co.* (C. C.) 159 Fed. 960).

In *Wallingford* v. *Ry. Co.*, *supra*, the Kansas court said:

> 'In our opinion the measure of damages as fixed by the contract is reasonable, valid and controlling. The provision is intended to establish a rule for determining the value of the property in the event of loss and not, as plaintiffs contend, to limit or diminish the carrier's liability'.

And in *Coleman* v. *N. Y., etc., R. Co., supra,* the Massachusetts court said:

> 'It was a reasonable contract to base the damages to be recovered in case of loss upon the genuine and honest invoice price between the parties. There is nothing contrary to public policy in such a contract.' * * *
>
> We conclude that, upon sound principle, as well as upon settled authority, the stipulation in the bills of lading here presented is valid and binding, and must be given effect according to its terms." (Italics supplied.)

The state court case chiefly relied upon below by respondent was *Ruppel* v. *Alleghany Valley R. R. Co.,* 31 Atl. Rep. 478. In that case the Supreme Court of Pennsylvania held invalid, as one limiting liability, a bill of lading clause which provided that loss or damage "shall be computed at the value of property at the time and place of shipment". The court held that this provision was "palpably a limitation of or reduction on the loss of the shipper. The sole inducement to shipment of marketable commodities is the higher price at point of destination".

The Pennsylvania court's conclusion as to the invalidity of the clause, it is apparent, is based on two assumptions, both of which, it is submitted, are untrue in fact. Contrary to the first assumption, it is common knowledge that, as, it will be observed, the courts in a number of the above cited cases judicially noticed, due to market fluctuation during transit the goods are often of less value at destination than at point of shipment. The second assumption, viz., that the sole inducement to shipment is a higher price at point of destination, is equally untrue in fact. As often as not goods are consigned by shippers from one port to their agents at another simply to secure a wider market for their goods. The shipper's margin of profit is included in the consignment invoice price, and where the shipper is guaranteed his transportation and

other costs, as here, he is secured not only against an out of pocket loss but his profit is preserved as well. It is obvious, we believe, that the Pennsylvania court's reason for holding the clause void is entirely unsound.

It is to be noted here in passing that the Pennsylvania courts refuse to sustain any limitation of the carrier's common law liability as to damages. The difference between the rule obtaining in the Pennsylvania courts and that obtaining in this court, as stated in *Hart* v. *Pennsylvania* (*supra*), was pointed out in *Grogan* v. *Adams Express Co.* (114 Pa. St. 523, 529). The difference was also noted in *Macfarlane* v. *Adams Express Co.*, 137 Fed. Rep. 982, where the Court, although sitting in Pennsylvania, refused to follow the rule obtaining in the Supreme Court of that State, as announced in, among others noted, the *Ruppel* case (*supra*).

The State Court of Appeals in New York has not squarely decided the question, but, as pointed out in *The Merauke* (*supra*) and by the District Court (R. p. 183), there is a distinct intimation, if nothing more, in *Kilthau* v. *International Mer. Marine Co.* (245 N. Y. 361, 366), that, if the effect of a clause is to "provide a new measure of damages of which either party may claim the benefit" and not "a valuation clause solely to limit liability", it is valid and enforceable. Respondent contended below that this view was abandoned in the case of *Straus* v. *Canadian Pac. Ry. Co.* (254 N. Y. 407). We submit, however, that there is nothing in the decision in that case that necessarily alters the court's view expressed in the *Kilthau* case. The *Straus* case, moreover, was ignored below by the Circuit Court of Appeals as expressing any view different from or inconsistent with that expressed in the *Kilthau* case, the court re-affirming its intimation as expressed in *The Merauke* (*supra*), as coinciding with that expressed in the *Kilthau* case, that where the agreement was to accept the invoice cost of the damaged goods as the measure of value at destination it was

one that may be of advantage to either party, and a salutary provision.

In the courts below and before the Commissioner, as we have pointed out and considered above, respondent's attack upon the clause was that it is a provision limiting the carrier's liability and invalid because there was no proof that the shipper was offered an alternative freight rate (R. pp. 189-190). In its brief in this Court in opposition to the petition for certiorari, however, respondent raised new points of attack. We consider them briefly.

It is said that the benefit to the shipper provided by the clause is "purely speculative". That claim is clearly unsound. As appears more fully in our next point, the protection that the clause affords to the shipper against the possibility of an out of pocket loss, a protection that the common law did not provide, attached and was present from the time the contract was entered into. That benefit is no more speculative than is the protective benefit afforded by a contract of guaranty or of indemnity or of insurance against loss. True enough, the ultimate financial value or advantage of the protection is uncertain, but that fact does not deprive the agreement of the reality of its benefit as protection, and the benefit attaches and is present from the inception of the contract.

It is further said that, under the provision of the clause, "if the market has fallen 50% the carrier will be liable for half the invoice value even if one unit (of the shipment) has sustained a trifling damage". This argument begs the question. It involves the assumption, contrary to the plain implications of the parties' agreement, that the supposed *injury* to but *one parcel* of the shipment affects injuriously but that *one parcel* and *not* the *shipment as a whole* and that it is, therefore, "trifling." This, of course, is not permissible. The shipper does not recover half the invoice price because the market has fallen 50% and the actual damage to one unit of the shipment is small. He recovers because he has been injured through the carrier's negligence and his damage is measured and

adjusted on the agreed basis of the invoice value of the entire shipment. Whether such damage is substantial or "trifling", then, cannot be determined until the application of the agreed yardstick; that is, until it is determined to what extent the arrived value of the shipment as a whole, has fallen below its invoice value plus necessary expenses.

Nor is the clause objectionable because the damage is adjusted on the basis of the entire invoice value rather than on the basis of the invoice value of the damaged unit when a single unit only is lost or damaged. The unit lost or damaged may be of small value in and of itself, but its damage or destruction may seriously injure or destroy the unity of the shipment or the unit value of the shipment and so materially affect, the use by the shipper, or the selling price, of the undamaged parcels. We may take, for example, a shipment of structural iron or of building stone or of books or of furniture or in fact any shipment in which the units may bear some relation to each other, or which the shipper may intend to use as a whole for some particular purpose or to supply a particular need. While the value of one unit of the shipment in and of itself may be small, yet its loss or damage would or might seriously affect the usable or sale value of the remaining undamaged units. In such cases, to measure the shipper's loss by the invoice value of the damaged piece or parcel alone would obviously not compensate the shipper for the loss sustained. On the other hand, to measure his loss by the difference between the invoice value of the entire shipment and the value of the shipment in its damaged condition, the measure provided by the agreement, would more nearly approximate full compensation to the shipper for the loss sustained. Certainly the carrier has no cause to complain if, under its agreement, it must because of its negligence pay an amount greater than it would have to pay under the common law. And still less cause of complaint has the shipper, if by virtue of such agreement he recovers more than the common law would give him.

Indeed, the point of this criticism of the clause overlooks the accepted basis for interference by the Court with freedom of contract in carrier cases, viz., to preserve and maintain the motive of the carrier to exercise care and diligence in the performance of its duties. *Railroad* v. *Lockwood* (17 Wall. 357, 377-378). The carrier in providing in the contract of carriage a measure of damages for his negligence greater than that imposed by the law obviously strengthens rather than impairs its motive to exercise care.

Finally, it is argued by respondent that the ultimate financial benefit or detriment that under this clause may result to shipper or carrier by reason of fluctuating market values is a "gambling element". If by this argument an inference is intended that the clause is objectionable as a gambling or wagering transaction, not only is the contention raised for the first time in this Court but also it is clearly untenable.

That this clause incorporated in a common and well recognized form of affreightment contract does not convert it into a wagering contract would seem too obvious for argument. The clause as pointed out in *The Oneida* (*supra*) was designed to provide for carrier and shipper mutual protection against abnormal fluctuations in market values occurring during the performance of the affreightment contract. It simply provides a formula for the adjustment of losses based on known contingencies and known values; certainly, in the light of experience, a rational provision, and one that provides both parties with a fixed basis upon and by which further protective action may be governed.

It is true, respondent made some attempt to state the agreement in wager terms. The attempt so to state it, however, discloses the absence of the essential elements of a wager contract. The contract shows on its face that neither party had thought or intent to enter into a wager. Their dominant interest was in the affreightment of the goods; all other interests were merely incidental to that

interest. In *Carlill* v. *The Carbolic Smoke Ball Company* (1892), 2 Q. B. 484, 490-491; appeal dismissed (1893) 1 Q. B. 256, the Court in defining a gambling or wagering contract said:

> "A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in the contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties."

Obviously no true description of the agreement in the case at bar, however liberally phrased, could bring it within the definition of a wager contract. If all other necessary elements of such a contract were present, it is clear that the real interest of the parties to the affreightment contract was its performance and reached far beyond the advantage that might result to one or the other from the chance condition of the market in the event of the goods' being delivered in a damaged condition.

Nor is a contract necessarily objectionable because an advantage or disadvantage under its terms results to one or the other of the parties on the happening of a purely fortuitous circumstance. Professor Williston in his work on contracts (Vol. 3, Section 1665), in defining "when an aleatory promise involves gambling", says:

> "A contract will not be open to objection because an advantage or disadvantage by the terms of the promise accrues to one of the parties on the happening of a purely fortuitous circumstance, provided that fortuitous circumstance adds to or depreciates the value of the consideration given the promisor; while if the fortuitous circumstance bears no relation to the value of the consideration the transaction will be a wager."

As we have pointed out above, the benefit or consideration to the shipper under the clause here is protection against the possibility of an out of pocket loss; the fortuitous condition of market values is simply a circumstance that measures the ultimate value of the protection given the shipper after that protection has been received and enjoyed. The more the market at point of destination advances by the time the goods arrive, the less valuable it proves the shipper's bill of lading protection to have been; the lower the market declines by that same time, the greater is seen to have been the good afforded by that consideration.

It seems clear, therefore, that respondent's new reasons, advanced here for the first time in the course of this litigation, for holding clause "Eleventh" of the affreightment contract invalid or unenforceable, are sustainable on neither precedent nor principle.

POINT II.

The holding of the Circuit Court of Appeals that the clause exempts the carrier from liability for losses due to its negligence and is contrary to public policy is based on faulty premises, is contrary to the principle upon which contractual modification of a carrier's common law responsibility has been regularly sustained, and is not supported by precedent.

Since it is apparent from its opinion that the Circuit Court of Appeals did not accept respondent's contention, or place its decision on the ground, that the clause is invalid because of the absence of proof as to a proffered choice of freight rates, and since the opinion definitely negatives that as the ground for its determination, it is appropriate here to consider the reason advanced by that court for reversing the decision of the District Court and

the sufficiency of that reason as a basis for the determination that the clause is unreasonable, contrary to public policy and void. The reason for so holding with the accompanying supporting illustration is set forth in the opinion of the Circuit Court of Appeals as follows (R. p. 196):

> "The clause under consideration does not substitute invoice value for market value of the goods lost or injured by the carrier's negligence. It provides that claims 'shall be adjusted on the basis of the invoice value of the entire shipment.' This means, as the appellee contends and the district court held, that the invoice value of the entire shipment, not the invoice value of the lost or damaged goods, is to constitute the basis for computing whether damages have been sustained by the shipper. Thus, if there were a short delivery of 50 cases out of a shipment of 100 cases, but the market value at port of destination of the goods delivered was equal to the invoice value of the 100 cases, plus freight, the carrier would pay nothing for its negligent loss of half the shipment; and a similar result would obtain if half the cases were damaged but the market value of all the goods, damaged and undamaged, was greater than their invoice value plus freight. Indeed, in the case at bar, although a substantial part of the cherries were lost or damaged by the carrier's negligence, it escaped liability because the arrived market value of the cherries in each shipment exceeded the invoice value of the entire shipment plus prepaid freight."

We believe that it is a fair criticism of the Court's exposition of the clause, as set forth above, to point out that it envisions only a one-sided view of the picture that the clause presents, and an altogether too imperfect one to judge of its merits or reasonableness. A more perfect view and a truer reflection of its accomplishments, to adopt a method of exposition somewhat similar to that used by the Court of Appeals, may be set down as follows:

> Thus, if there were a *short delivery,* whether of 1 or 50 cases out of a shipment of 100 cases, and the

> market price at port of destination of the goods delivered was less than the invoice price plus expenses incurred by shipper, the latter is guaranteed a recovery, irrespective of market price or the number of cases lost, of the total invoice value of the shipment plus all expenses incurred; and, in the event that the market price, by reason of fluctuating or unsteady condition, is materially lower than the invoice value, the carrier must pay proportionately greater damages for its negligent loss than that for which it would be liable under the common law measure. And a similar result would obtain irrespective of whether 1 or 50 of the cases were *damaged* and whether the market price of all the goods damaged and undamaged was less than the invoice value; the shipper is guaranteed irrespective of market price or number of cases *damaged* the total invoice value of the shipment plus expenses, and, as in the case of *loss*, if the market price is materially lower than invoice value, the carrier must pay proportionately greater damages for its negligence than those for which it would be liable under the common law.

In other words, under this clause, the carrier guarantees the shipper against an out of pocket loss irrespective of market conditions at destination, and, by reason of such guarantee, it may result that the carrier must pay greater damages for its negligence than those for which it would be liable under the common law measure.

The fault, we submit, in the court's reasoning, by which it arrived at the conclusion that the clause exempts the carrier from liability for its negligence, lies in the false assumption that the standard by which to measure loss and damage is the common law measure, whereas, (under the standard agreed upon), damage is to be measured by the invoice value of the entire shipment plus expenses. The court conceded that the arrived market value of the cherries "exceeded the invoice value of the entire shipment plus prepaid freight". That being true, the shipper obviously has suffered no damage *under the*

agreed standard for measuring it. And, since we are here considering negligence in terms of loss or damage resulting therefrom, inasmuch as the shipper suffers no loss under the clause, necessarily the clause provides no exemption from damages or negligence for the carrier.

A conclusion that a clause is invalid and against public policy, as exempting the carrier from its negligence, may not be arrived at by a showing that under it the carrier escapes liability as measured by the common law. If that were true the agreed value or limitation clauses would in many cases be invalid. The rule is, however, that, notwithstanding the agreed value or limitation is purely arbitrary and grossly disproportionate to actual value or to value as measured by the common law, it will not be held invalid for that reason, (*Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278). The test as to validity is, as we believe we have demonstrated above, as follows: Is the clause reasonable under the circumstances? Does it provide the shipper with some compensating right, or is it for the sole benefit of the carrier? As was said in *Union Pac. R. Co.* v. *Burke*, 255 U. S. 317, 323, (much relied upon and quoted by respondent in the lower court), where this court held a limitation clause invalid on its appearing that the shipper was given neither alternative rates nor other compensating privilege:

> "To allow the contention of the petitioner, would permit carriers to contract for a partial exemption from the results of their own negligence without giving the shippers any *compensating privilege.* Obviously such agreements could be made only with the ignorant, the unwary or with persons deliberately deceived." (Italics supplied).

It is of interest to note that the bill of lading in the above case also contained a clause similar to the one under consideration in the *Gulf, Colorado* case (see p. 320). And although this Court, as had the New York Court of Appeals, rejected the limitation clause also contained in

the bill, it gave full effect to the clause substituting invoice value for market value at destination.

What outlawed the clause below in the eyes of the Circuit Court of Appeals was the provision therein that the unit, on the invoice value of which the loss and damage was to be computed, was "the entire shipment", instead of that part of the shipment which was lost and damaged. As will be observed from the opinion of the District Court, however, that court arrived at its determination that the invoice value of the "whole shipment" was the value upon which to compute damage, independent of and without any reference whatever to the words "entire shipment" as used in the clause (R. p. 184). The holding of that court, viz., that "the effect given similar clauses in the past has been that the damages are the difference between the invoice value of the entire shipment and the market value at time and place of destination of the goods in their actual condition" (R. p. 184), is certainly supported by the language used in the cases to which the court referred, viz.: *Gulf Colorado Ry.* v. *Texas Packing Co.* (*supra*); *The Oneida* (*supra*) at pages 692-693; *Duplan Silk Co.* v. *Lehigh Valley R. Co.* (*supra*).

There is nothing inherently objectionable or unjust in providing that loss and damage be adjusted on the basis of the invoice value of the entire shipment. Such an adjustment may operate to the advantage of the shipper quite as often as to that of the carrier. Indeed in some cases it is much more equitable, as in all it is certainly more convenient, to the shipper, to use the entire shipment as the basis. Consider, for an example, bulk shipments, such as grain. While the cargo may have been exposed to some damaging agent such, for instance, as wetting or heating, a substantial portion of it may, if it is carefully separated, be found to have suffered no actual or perceptible damage. Still, doubtless, the fact that this undamaged portion is a part of a shipment that has been damaged might affect the price for which the shipper

could sell any portion of it. And, certainly, the inconvenience to the shipper in making the separation would constitute no small hardship. It would seem obvious, in such cases, that it would be far more just to the shipper to measure the damages on the basis of the invoice value of the entire shipment.

The same result might as well ofttimes be true as to shipments in bags, cases or crates. The entire shipment may have been exposed to the damaging agent, yet in different or varying degrees, so that on complete separation a substantial part thereof would be found entirely undamaged. Here also, and for the same reasons as those pointed out above, ultimately it would probably prove more just to the shipper to use the invoice value of the entire shipment as the basis of adjustment.

Consider again a case where the shipment consists of meats or dressed fowl in iced or refrigerated cars. Because of defective refrigeration or the failure properly to ice or re-ice during transit the shipment as a whole may arrive at destination in a tainted condition. A thorough and careful inspection and separation may nevertheless disclose much of the shipment to have suffered no damage. It would only be natural under the circumstances, however, that the price that would be offered or that could be obtained for this undamaged portion would be materially affected and influenced by the tainted condition of the shipment as a whole. A measure of damage in such a case, therefore, that was based on the invoice value of the damaged goods only might very likely fall far short of making the shipper whole; a contingency that would be avoided were the damage measured by the difference between the invoice value of the entire shipment and its value at destination.

Examples might be multiplied illustrating the advantage to the shipper of a measure of damages based on the invoice value of the entire shipment rather than on only the damaged portion thereof. Such we believe unnecessary. It is enough, it would seem, that it appears that

such a measure cannot be said to be inherently objectionable, unreasonable or unjust.

Moreover, the result visualized by the Circuit Court of Appeals, as the effect of adjustment based on the invoice value of the entire shipment and condemning such adjustment for that reason, might as well occur when adjustment is based on the invoice value of merely the damaged part of the goods alone, which it in substance approved. Take, for example, the shipment here involved, viz., barrels of cherries in brine. The Commissioner found that the contents of approximately 1051 barrels (the figure including a few short delivered) were damaged in varying percentages (R. pp. 173-174, 175, 176, 178). The percentage of damage suffered was not actual but an estimate (R. pp. 104, 115) and was a damage in value, the barrels containing both sound, shrivelled and broken cherries, all of which were used, but for different purposes (R. p. 155). The Commissioner, however, for the purposes of convenience in figuring loss, converted these various estimated damage percentages into barrels of destroyed cherries, which he computed as approximately 574 barrels (R. pp. 173-176). Now, if we should assume that the arrived value of the 1051 damaged barrels was equal to their invoice value plus freight (and there is no clear proof that it was not), and further assume that the bill of lading clause in question had made the invoice value of the *damaged barrels* of cherries the basis for computing damages, the Circuit Court of Appeals would then have approved of precisely the same result as that which it has set forth as a reason for declaring the clause "unreasonable", "contrary to public policy and void", viz., that "although a substantial part (1051 barrels) of the cherries were lost or damaged by the carrier's negligence it escaped liability because the arrived value of the (1051 barrels of) cherries * * * exceeded the invoice value of the entire (1051 barrels of the) shipment plus prepaid freight" (Parenthetical expressions supplied).

There is, of course, no doubt that the true construction and application of a clause substituting *generally* invoice

value for market value requires that in "arriving at the amount of damages" the commissioner "take the difference between this invoice price and the value" of the merchandise "at the time the same was delivered" at destination. That method was specifically in issue and specifically approved both by this Court in *Gulf Colorado Ry.* v. *Texas Packing Co.* (*supra*) at page 36; and by the Circuit Court of Appeals in *The Oneida* (*supra*) at pages 692-693.

We cannot believe that there is any moral principle or any principle of public policy involved that depends upon whether the contractual basis provided for adjustment of damages is the invoice value of the entire shipment or the invoice value of the lost and damaged portion of the shipment. Either method of adjustment may prove of advantage to the shipper and of detriment to the carrier, or *vice versa;* the difference in benefit or detriment being at most simply one of degree. And it is submitted that a question of public policy cannot arise on such a tenuous foundation.

The Circuit Court of Appeals did not cite any decision, and we believe none is to be found, that holds this clause invalid or against public policy. Some reliance, however, was placed on a *dictum* in *Pearse* v. *Quebec Steamship Co.* (24 Fed. Rep. 285, 288). The clause under consideration in that case provided that the ship owner "will not be liable for *more* than the invoice value of the goods". Under this clause (later definitely construed as a true limitation of liability clause and not one fixing an impartial measure of damages, *The Styria,* 101 Fed. 728, 734), the District Court held that the goods referred to were plainly the damaged goods and that damages were to be ascertained by taking the difference between the invoice value of those goods and the value that was realized for them on sale. By way of *dictum* the court said that if the clause was to be construed as referring to both damaged and undamaged goods,

> "it would be void upon grounds of public policy, as unreasonable and as affording a direct encouragement

> to theft or non-delivery of the shipper's goods; for on every shipment, whether there was loss or not, the carrier might, without accountability, appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole, a result destructive of all commerce because enabling the carrier to appropriate all its profits."

This *dictum* shows on its face, it would seem, its own unsoundness. For, if the carrier steals or retains a part of the shipper's goods for its own benefit, it commits a larcenous act for which a criminal prosecution will lie. And clearly, in civil actions likewise the carrier can not "*without accountability* appropriate to his own use" any part of the "*owner's goods*". Any such act would obviously constitute conversion and deviation by the carrier, which would, despite such clause, not only make the carrier liable for the goods thus appropriated but also deprive him of any and all contractual benefits provided in the contract of carriage and render him an insurer without limit. (See *D'Utassy* v. *Barrett,* 219 N. Y. 420, 421; *Moore* v. *Duncan,* 237 Fed. Rep. 780, 782; *The Sarnia,* 278 Fed. Rep. 459, 466). It would seem obvious, therefore, that the *dictum* of the district judge in the above case offers no reasonable ground for declaring the clause here involved unreasonable and against public policy.

Respondent cited below, and also in this Court, in opposition to certiorari, the case of *Morrison* v. *I. & V. Florio S. S. Co.,* 36 Fed. 569, as bearing on the question. The Circuit Court of Appeals made no reference to the case, it is clearly without application on the facts and it adds nothing for consideration here. The contract of carriage in that case did not substitute for the common law standard of value a fair conventional standard, and the court necessarily measured the loss by the former standard.

Nor can it justly or logically be said that because value under the common law standard chances to be higher than value under the agreed standard on delivery of the goods,

that to measure loss by the agreed standard allows the carrier to profit by his own wrong. The carrier no more "profits" from his wrong in such case than the shipper "*profits*" from the carrier's wrong where value under the common law standard chances to be less than value under the agreed standard. There is no principle that a shipper is to be rewarded or profit because the carrier is negligent. On principle he is entitled only to compensation for his loss from such cause; and the standard to measure his loss and the carrier's liability, where the latter is negligent, is the same whether the common law standard of market value is higher or lower than the agreed standard.

While the Circuit Court of Appeals has held that here the "contract exempts a carrier from liability for losses resulting from its negligence", it appears clear that when the contract was entered into it did not provide for exemption from any real loss sustained by the shipper. No other value to the shipper than invoice value could have been in the contemplation of both contracting parties, nor any other loss than such as would result from a failure to obtain that value. At most, however, the only exemption the contract could be said to provide for was an exemption from payment of *fortuitous profits* that might result from market fluctuation during transit, and for that exemption it gave the shipper compensating protection against *fortuitous losses* resulting from the same cause. Why should not carrier and shipper be free to enter into such a contract? What interest of the public is served in refusal to enforce it? This is not a case where any unfair advantage has been taken of the shipper. It knew the terms of the contract of carriage, assented to them and signed the contract. It made no protest against its terms at the time of shipment or subsequently prior to delivery of the goods. It not only did not protest the terms of shipment, but also presumably was satisfied with, and glad to avail itself of, the protection afforded it thereby.

As a matter of fact the shipper was not, under the terms of the clause here involved, necessarily deprived of recov-

ing even the fortuitous gain resulting from fluctuation in price between date of shipment and arrival at destination. As will be observed this clause is not limited simply to the addition to invoice value of freight paid or incurred, but provides instead for "adding expenses necessarily incurred" (R. p. 194). Since it is the invariable practice for the shipper to procure insurance on the goods shipped, as was done here (O. R., pp. 125, 154-155; R. pp. 101, 127), it is reasonable to assume that the cost of procuring insurance was one of the necessary expenses guaranteed by the carrier. Thus the shipper was under this clause not only assured against any out of pocket loss by reason of fluctuating prices, but also of the expense of procuring insurance that would insure the recovery of any gain that otherwise would have resulted from like causes.

Public policy far from interdicting the enforcement of the clause requires its enforcement. "The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society" (*Hartford Ins. Co.* v. *Chicago, etc., Railway,* 175 U. S. 91, 106). On the other hand the well settled policy of freedom of private contract, the common policy of English speaking peoples requires that unless it clearly appear that they contravene public right or the public welfare contracts must be enforced. As was said by Sir George Jessel in *Printing etc. Co.* v. *Sampson,* L. R. 19 Eq. 462, 465 (quoted by this Court in *Hartford Ins. Co.* v. *Chicago, etc. Railway, supra*):

> "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and

> shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

We submit that this clause clearly does not contravene public right or the public welfare. The shipper here has enjoyed the protection offered by the clause during the period of transportation, a protection that the common law did not provide for him. Having enjoyed the benefit and protection offered by the clause during transportation, no sound principles either of justice or of public policy, it would seem, can justify the shipper's repudiation of his agreement under the clause after the event shows it to have been to his interest to do so. To allow him to avoid the contract when the event of shipment shows it to have been to his advantage to do so, a contract entered into without protest of any kind by him at the time of, or subsequent to, shipment, is, it would seem, to reward him for a form of duplicity or deceit, and the only interest served that of his cupidity.

In *Hart* v. *Pennsylvania*, 112 U. S. 331, the bill of lading contained an agreed value or limitation clause and the shipper under it had enjoyed the benefit of a reduced freight rate in the shipment of his livestock. After transportation had been finished the interest of the shipper lay in, and he attempted a repudiation of, the limitation provision. In enforcing it, this Court said in part at page 341:

> "It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

We submit that there is no difference in principle between the *Hart* case and the one at bar. In the *Hart* case the shipper had under the clause enjoyed a reduced freight rate in transportation. Here the shipper under the clause had enjoyed protection against the possibility of an out of pocket loss resulting from a falling market. After the event of transportation in the *Hart* case it was to the shipper's interest to repudiate his agreement, just as here it was to the interest of the shipper after the event of transportation to repudiate its agreement. Benefit, although different in kind, was enjoyed by the shipper, in the one case as well as in the other, and repudiation, we submit, is no more permissible here than it was there.

We submit in conclusion that the holding of the Circuit Court of Appeals that the clause exempts the carrier from its negligence is without justification, and that there is no other ground for holding that the clause is contrary to public policy and void.

POINT III.

The decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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